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In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

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The Committee on Energy & Commerce, College Recruiting: Are Student Athletes Being Protected? http://energycommerce.house.gov/108/Hearings/03112004hearing1226/hearing.htm (March 11, 2004) 9

Kevin P. Braig, A Game Plan To Conserve the Interscholastic Athletic Environment After Lebron James, 14 Marq. Sports L.J. 343 (2004) 9, 10

Knight Commission on Intercollegiate Athletics, A Call To Action: Reconnecting College Sports and Higher Education http://www.knightcommission.org/about/reports/category/A%20Call%20to%20Action/ (June 2001) 8

Knight Commission on Intercollegiate Athletics, Keeping Faith with the Student Athlete: A New Model for Intercollegiate Athletics http://www.knightcommission.org/about/keeping_faith_download_a_pdf_of_this_publication/ (March 1991) 8

National Federation of State High School Associations, 2006-07 Handbook (2006) 4

Paul C. Weiler, Leveling the Playing Field (2000) 4

William G. Bowen & Sarah H. Levin, Reclaiming the Game: College Sports and Educational Values (2003) 8, 9

INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics.[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

Based on the purposes underlying the NFHS and its objectives, the NFHS has a strong interest in whether

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

recruiting for athletic purposes at the high school level can be properly regulated by state high school associations. If this Court affirms the judgment in favor of Respondent Brentwood Academy on its First Amendment claim, the ability of state high school associations to regulate athletic recruiting, and to prevent the inequities that it engenders, will be significantly compromised.

SUMMARY OF ARGUMENT

Brentwood Academy's First Amendment challenge to the Anti-Recruiting Rule of the Tennessee Secondary School Athletic Association ("TSSAA") poses a nationwide threat to high school athletics. Every state high school athletic association in the United States forbids athletic recruiting at the high school level. These associations collectively consist of 18,654 schools and represent over seven million student-athletes.

State associations prohibit recruiting for good reason. High school athletics are and should remain an educational experience, as well as a source of pride and cohesion for student bodies, parents, and communities. Recruiting for athletic purposes threatens these goals by making competition unfair, in that it allows private schools to entice superior athletes from wide geographic areas, while the public schools against which they compete are largely limited to students within defined geographic boundaries.

The Sixth Circuit's opinion limiting enforcement of the TSSAA Anti-Recruiting Rule has implications for high schools nationwide. The decision will have a chilling effect on the enforcement of comparable rules in other states. It threatens the current competitive balance between private and public schools, and promises to increase dissension between

them. By allowing anti-recruiting challenges on a case-by-case basis, it also encourages litigation and harms the finances of state high school associations.

Fairness in athletic competition supports quality academics; unfairness works the opposite result. The current state of big-time college athletics, where recruiting is "legal," provides a cautionary example. Too many Division I college athletic programs have strayed from their educational missions and brought discredit to their institutions. There is no reason to believe that allowing high school recruiting would produce a happier result. By allowing Brentwood to circumvent the anti-recruiting rule to which it agreed, the Sixth Circuit has set an unfortunate precedent that high schools nationwide will be tempted to follow. An unfair competitive environment – which recruiting encourages – will harm American secondary education.

ARGUMENT

The NFHS believes that the primary mission of United States high schools should be to foster academic education. While the NFHS views cocurricular activities,[2] including athletics, as an integral part of the high school experience, those activities should remain consistent with the schools' academic missions. The recruiting encouraged by the Sixth Circuit's decision would change the existing balance between athletics and academics, and would undermine the sense of

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[2] The phrase "extracurricular activities" is commonly used to refer to activities that supplement the academic aspect of high school education. Many educators, however, prefer the use of the term "cocurricular activities" based on their belief that such activities, when kept in their proper context, are inherently educational and support the academic mission of schools.

community that gives a uniquely local character to high school sports.

I. The Uniform Enforcement of Anti-Recruiting Rules is Important to High School Athletics.

State high school athletic associations are comprised of professional educators, most of whom are school principals. The fact that these educators have uniformly and consistently enacted anti-recruiting rules is telling. As the NFHS 2006-07 Handbook explains in identifying reasons to limit high-school recruiting:

> A recruiting/undue influence prohibition discourages exploitation of students; prevents over-emphasis of athletics; gives average student-athletes more opportunity to participate; discourages adults from jeopardizing students' eligibility; and prevents misuse of athletic programs.

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2006-07 HANDBOOK 20 (2006).

Competitive equity is essential to athletic competition. This simple truth is grasped by nearly everyone, from children who take turns picking team members to professional sports teams that have draft and salary restrictions. "[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." PAUL C. WEILER, LEVELING THE PLAYING FIELD 2 (2000).

Competitive equity also promotes classroom education — in fact, athletics are an extension of the classroom. The TSSAA Constitution recognizes that "the primary objective of

all secondary schools is to educate youth" and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." If students perceive that competition is unfair, its educational value is compromised. Indeed, students will eventually stop participating if they decide competing is futile. Jack Roberts, the Executive Director of the Michigan High School Athletic Association, testified below that an anti-recruiting rule is necessary for a fair competitive environment because without such a rule, students who lose games consistently will lose the willingness to compete. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F.Supp.2d 981, 993 (M.D. Tenn. 2003), *rev'd in part on other grounds*, 442 F.3d 410 (6th Cir. 2006). Anti-recruiting rules like those promulgated below by the TSSAA preserve competitive equity and enhance the athletic experiences of American high school students. Without such rules, competitive equity suffers, to the detriment of American secondary education.

The Court has already recognized that high school athletic programs play an "integral" role in secondary schools. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001). Recruiting weakens this integral role by undermining the fairness of competition. Recruiting also displaces students who have worked their way up to team membership or starting positions at their schools, leading to disharmony among students, weakened school spirit, and a loss of community support for interscholastic activities. Finally, recruiting draws coaches away from their teaching responsibilities by requiring them to spend time and resources pursuing students solely for non-academic purposes.

The Sixth Circuit's opinion promotes recruiting at the expense of academics. The judgment below should be

reversed or modified to allow reasonable restrictions on high school recruiting.

II. Anti-Recruiting Rules Are Important to NFHS Members and Necessary to Preserve the Competitive Balance Between American Public and Private High Schools.

Anti-recruiting rules are also vital to NFHS members. Though each of the 50 states and the District of Columbia has an athletics or activities association, participation by private schools in these associations is entirely voluntary. Some private schools, including prominent ones like Oak Hill Academy in Virginia and Mount Zion Academy in North Carolina, choose not to join state high school associations because they do not want to be bound by the associations' rules. While these schools have successful athletic programs, they deliberately forego the opportunity to compete in association-sponsored championship tournaments in return for other benefits, particularly the ability to recruit freely. Here, however, Brentwood chose to join the TSSAA so it could compete against other TSSAA schools. In so doing, it contractually agreed to be bound by the TSSAA's rules of competition, including the anti-recruiting rule, which collectively ensure the fairness of competition between public and private schools. Waiving the right to recruit in return for broader competitive opportunities is a reasonable restriction to which Brentwood and TSSAA should be free to agree.

If anti-recruiting rules like the one now at issue become unenforceable, the fragile competitive balance between public and private high schools will be disturbed, and dissension between them will likely increase. If high school recruiting is expanded, public and private schools would no longer be on equal footing, and both would be harmed. Public schools

would be disadvantaged because, unlike private schools, they generally would be limited to students within their set geographic boundaries. Private schools, with their rosters enhanced by recruiting, would find fewer and fewer public schools willing to compete against them. Such a fractured competitive environment is not constitutionally necessary, and the Court should strive to avoid it.

The decision below also threatens the finances of the state associations that are NFHS members. The decision encourages future litigation because the Sixth Circuit essentially analyzed whether Brentwood's particular violation of the anti-recruiting rule was harmless. This analysis ignores the Court's precedent instructing that the correct inquiry is not whether a rule's purposes are promoted when applied to a particular plaintiff, but whether a rule is justified generally by substantial state interests. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978). Under the Sixth Circuit's approach, anti-recruiting rules would lose their deterrent effect because parties would be allowed to challenge the rules' enforcement in particular cases and argue that their purposes are not furthered in specific contexts. Because state associations have limited financial means, *any* threat of litigation, much less the widespread threat the Sixth Circuit's analysis promises, will have a chilling effect on these organizations' ability to investigate and enforce their rules. This separate ground supports reversal of the Sixth Circuit's decision.

III. Recruiting Has Already Harmed Intercollegiate Athletics, and Promises To Harm High-School Athletics As Well.

The college experience foretells the harms that expanded recruiting will bring to American high schools. Big-time

college athletics are too often driven by winning and revenue generation at the expense of academic achievement. And recruiting is at the core of the problem.

As far back as 1989, the Knight Commission, a group composed of prominent educational and athletic leaders, concluded that so many abuses already existed in college athletic recruiting that the balance between academics and athletics was all but lost. *See* Knight Commission on Intercollegiate Athletics, *Keeping Faith with the Student Athlete: A New Model for Intercollegiate Athletics.*[3] The Knight Commission reconvened in 2001 and determined that despite considerable effort, the problem had worsened. *See* Knight Commission on Intercollegiate Athletics, *A Call To Action: Reconnecting College Sports and Higher Education.*[4]

Others have recognized the adverse effects of recruiting on college students:

> Recruited athletes earn far lower grades than what might be expected on the basis of their incoming academic credentials and demographic characteristics. This striking "underperformance" phenomenon appears to be related directly to the criteria used in recruiting and admitting these athletes – and not to time commitments, differences in race or socioeconomic status, field of study, or the intensity of the athletic experience. Recruited athletes

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[3] http://www.knightcommission.org/about/keeping_faith_download_a_pdf_of_this_publication/ (March 1991).

[4] http://www.knightcommission.org/about/reports/category/A%20Call%20to%20Action/ (June 2001).

> underperform even in seasons or years when they are not participating in athletics.

WILLIAM G. BOWEN & SARAH H. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 328 (2003). The profoundly negative impact recruiting has had at the college level, particularly in football and men's basketball, has even caused concern in the United States Congress. In 2004, a House of Representatives subcommittee conducted a hearing entitled "College Recruiting: Are Student Athletes Being Protected?" *See* The Committee on Energy & Commerce, *College Recruiting: Are Student Athletes Being Protected?*[5]

Recruiting at the college level is not only at odds with the fundamental academic mission of American schools, but it can injure students in other ways:

> This evidence [from Bowen and Levin's book *Reclaiming the Game*] suggests that inter-community recruiting can pollute the educational value of the interscholastic athletic environment by sending the message to students that the external, competitive value of athletics in the form of glory and profit is more valuable to the student than the student's internal academic and social development. This evidence suggests that inter-community recruiting can pollute students by sending the message that developing one's athletic assets (which for all but a tiny percentage of students are wasting assets) for consumption by others is more valuable to the student than developing one's

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[5] http://energycommerce.house.gov/108/Hearings/03112004hearing1226/hearing.htm (March 11, 2004).

> academic and social assets (which for all students are appreciating assets) for one's own personal growth and benefit.

Kevin P. Braig, *A Game Plan To Conserve the Interscholastic Athletic Environment After Lebron James*, 14 MARQ. SPORTS L.J. 343, 357 (2004).

High school students recruited for athletic prowess may similarly develop a false sense of superiority and a self-image grounded solely in athletics. The reality is that less than one percent of high school athletes will ever compete professionally. Many of these recruited athletes, once denied a career in professional sports, may lack the academic tools they need to succeed in society.

Anti-recruiting rules like the one enacted in Tennessee can help lessen the tendency of top athletes to view sports as the only important part of their lives, a view that can lead to the use of performance-enhancing drugs, over-use injuries, missed classes, and premature specialization in a single sport. Such rules can also restrain adults from exploiting student athletes for their own financial gain or recognition.

Allowing high school athletic recruiting to expand will not serve the interests of America's student-athletes. High-school educators prohibit recruiting for good reason, and the courts should support rather than hinder their efforts whenever possible.

CONCLUSION

High school athletic competition has a proud tradition, one the NFHS wants to preserve. Recruiting is antithetical to high school educational athletics. It is at odds with what should be

the schools' primary academic mission. The Sixth Circuit's opinion limiting enforcement of high school anti-recruiting rules is a step backward in American education. The judgment below should be reversed.

Respectfully submitted,

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